II. BOOK REVIEWS.

A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, including the statutes and judicial decisions of all jurisdictions of the United States. By John Henry Wigmore. In four volumes. Boston: Little, Brown and Company. 1904–5. pp. lv, 1–1002; xxi, 1003–1974; xv, 1975–3184; xiii, 3185–3921. 4to.

This is unquestionably one of the most important treatises on a legal subject published during the last generation. Professor Wigmore's long study of the subject of evidence, both its history and its present state, has borne good fruit in the monumental treatise he has prepared. It is hardly too much to say that this is the most complete and exhaustive treatise on a single branch of our law that has ever been written.

The patience with which the material has been collected, the fullness and completeness of the treatment, the exhaustive citation of authority, and the wealth of illustration and apt quotation are wonderful. Not only has Professor Wigmore collected here all the decisions of common law courts on the subject of evidence, but he has also collected the statutes of England and of the United States; a far more difficult task than the collection of decided cases. So thoroughly has the work been done that these volumes, in addition to their other merits, will serve as a source book for future investigators of this branch of law.

So important a book cannot be dismissed with a short review. To enumerate its merits alone would require more space than can be afforded. It was crowned by anticipation in the bestowal of the Ames prize two years before its publication. It has been long expected by legal scholars who have followed with interest Professor Wigmore's historical essays, and it has the rather mournful distinction of being perhaps the only monument which we shall have on so considerable a scale of Professor Thayer's studies in evidence. That Professor Wigmore owes a great debt to his distinguished teacher, he himself is the first to admit; and his graceful dedication, in which he joins Professor Thayer with Judge Doe, as "two masters in the law of evidence," emphasizes the indebtedness. Most of Professor Thayer's pupils would probably place him before Judge Doe in such a dedication.

Professor Wigmore has hit upon one great improvement in lawbook-making, which should be mentioned at the outset. In his notes he has not only collected great numbers of cases, supporting the propositions of his text, but he has stated in half a line the distinguishing facts of the case in such a way that a lawyer searching the notes for authority may know at a glance which cases are worth his examination.

The author's analysis of the subject is most exhaustive. It has all the distinctive characteristics of the author; patience, thoroughness, minute attention to detail, and the novelty of arrangement which a strong and original mind alone can give. The analysis is so original that it is worth giving in full.

BOOK I. What Facts may be presented as Evidence (Admissibility).
  Part I. Relevancy.
    Title I. Circumstantial Evidence (divided into fourteen topics, each dealing with evidence introduced to prove some human act, quality or condition or some fact of nature).
    Title II. Testimonial evidence (divided into thirteen topics, dealing with the qualifications, impeachment, and rehabilitation of witnesses).
    Title III. Autoptic Proference (Real Evidence).
  Part II. Rules of auxiliary probative value.
    Title I. Preferential rules.
      Sub-Title I. Production of documentary originals.
      Sub-Title II. Rules of testimonial preference.
    Title II. Analytic rules: The Hearsay Rule.
      Sub-Title I. The Hearsay Rule satisfied.
        Topic I. By cross-examination.
        Topic II. By confrontation.

Sub-Title II. Exceptions to the Hearsay Rule (here are discussed in fourteen topics the ordinary exceptions).
Sub-Title III. Hearsay Rule not applicable (Verbal acts, res gestae, etc.).
Sub-Title IV. Hearsay Rule as applicable to court officers (Jurors, judge, counsel, interpreter).
Title III. Prophylactic rules (*i. e.* the devices, such as oath and publicity of trial, by which the attempt is made to secure truth of the testimony).
Title IV. Simplificative rules.
Sub-Title I. Order of presenting evidence.
Sub-Title II. Rules of exclusion for confusion of issues, unfair prejudice, or undue weight.
Sub-Title III. Opinion rule.
Title V. Quantitative rules.
Sub-Title I. Number of witnesses required.
Sub-Title II. Kinds of witnesses required.
Sub-Title III. Verbal completeness.
Sub-Title IV. Authentication of documents.
Part III. Rules of extrinsic policy.
Title I. Rules of absolute exclusion.
Title II. Rules of optional exclusion (Privilege).
Part IV. Parol evidence rule (Constitution of legal acts).
Book II. By whom evidence must be presented (Burden of proof: Presumption).
Book III. To whom evidence must be presented (Law and fact; judge and jury).
Book IV. Of what propositions no evidence need be presented.
Title I. Judicial notice.
Title II. Judicial admissions.

Every principal division is prefaced by an historical or theoretical introduction. Such a method of analyzing and developing the subject is a most admirable one, and future writers of legal treatises will be under great obligation to Professor Wigmore for the care with which he has worked out his plan. With a full index (which completes the work) it is easy to find not only the authorities on any special point, but the connection of that point with other parts of the subject; the historical and philosophical considerations which bear on its decision; and such practical arguments as the author after many years' careful study of the subject has been able to bring to bear on the solution.

For greatness of conception and patience of execution, for complete collection of authority, and for fullness and vividness of treatment, this treatise cannot be too warmly commended; but, unfortunately, some of the very things which contribute to its excellence have also led to certain regrettable defects that cannot be passed over in silence. Some of these defects are of mere detail, but some of them, on the other hand, are absolutely fundamental; and it is to be feared will prevent the work being as useful in practice as it must be to the teacher and the student.

Perhaps the most important of these defects is apparent from the very analysis of the subject copied above. This analysis is careful, original, and thoughtful; but it is new and strange, and probably would not help a lawyer in practice in his attempt to find the authority bearing upon a particular question at hand. The reviewer must speak on this matter with some hesitation, because use alone can be the final test. To lawyers trained as students in this analysis it may be entirely feasible, but to the present generation of lawyers, to whom it is novel, it may be simply repellent.

For instance, it does not seem possible that the author is either right or wise in bringing together as complementary subjects the titles of his first book, on Relevancy. Title I, on Circumstantial Evidence, is really a discussion of the general rules of admissibility; Title II, on Testimonial Evidence, contains the matter usually grouped in a chapter or chapters upon witnesses and methods of examination; while Title III, on Autoptic Proference, discusses the subject usually known as real evidence. To an ordinary lawyer it seems a little strange to regard these three seemingly unrelated subjects as together making up one great branch of the law of evidence. Originality is well enough, but to accomplish anything originality should be accompanied by sound judgment.

It is very likely that the author's subdivision of the subject was helpful to him in his enormous task of classifying the many thousands of cases with which he was forced to deal, but a classification which is based neither on historical nor on philosophical reason, nor on established use, should not appear in the published book; like the builder's scaffolding, every trace of it should be removed before the public is admitted to the finished edifice.

Not only the analysis but the nomenclature is novel. In place of well-known terms, to which we are accustomed, Professor Wigmore presents us with such marvels as retrospectant evidence, prophylactic rules, viatorial privilege, integration of legal acts, autoptic proference, and other no less striking inventions. It is safe to say that no one man, however great, could introduce into the law three such extravagantly novel terms, and Professor Wigmore proposes a dozen. Some of these terms have an unintentionally humorous effect; "autoptic proference" suggests to an ordinary man who has forgotten his Greek, the evidence of a physician before a coroner's jury, rather than such real exhibits as may be presented in evidence at a trial. "Prophylactic rules" suggest the printed directions which accompany a patent tooth-brush.

A few of his new terms he had already used in his notes in the last edition of Greenleaf, and their use there met with such a chorus of objection that he has thought it necessary in this work to justify their use; his justification, however, cannot be regarded as a happy one. To use the phrase "autoptic proference" instead of real evidence may be of great assistance to the author in sorting his cases and in formulating his text, but it is of no conceivable use to any lawyer who has occasion to consult the book.

When we come to the subject-matter we find it admirable in every way. The historical discussions are illuminating, the statement of doctrine is clear and sufficiently precise, and the argument is always enlightening and usually convincing. To select any particular portion of the text for special praise is almost impossible, so uniform is the merit of the work. Whether the author treats (in several parts, as a result of the peculiarity of his analysis) documentary evidence, or the privilege of witnesses, or the hearsay rule, he is uniformly happy in his treatment. His emphasis on the necessity of cross-examination as the basis of the hearsay rule is not quite orthodox, but it is probably correct, logically and historically.

The author has drawn his illustrative quotations from many sources with great advantage. It sometimes looks a little remarkable to see a long passage from Burke, or from Professor Sedgwick's philosophical work, cheek by jowl with a passage from an opinion of Baron Parke or Judge Doe; but no lawyer would be any the worse for an excursus into the realms of philosophy or polite literature. Space has been taken for rather long discussions on somewhat unrelated subjects; such as the propriety of granting a new trial where an error has been made in the admission or the exclusion of evidence. It might have been better in some cases (as in the example just stated) if Professor Wigmore had expressed himself a little less positively in a matter outside the strict scope of his work; for his views are, to say the least, questionable.

In spite of its imperfections, this is, and must long remain, the best treatise on the common law of evidence. Lawyers must learn to overlook the peculiarities of nomenclature; students must be content to accept the analysis as a convenient division of a vast material: for we have here what we have never had before, and are unlikely to have again, at least in this generation; a complete and accurate presentation of the principles and of the authorities of the law of evidence.

J. H. B.

THE LAW OF FOREIGN CORPORATIONS and Taxation of Corporations, both Foreign and Domestic. By Joseph Henry Beale, Jr. Boston: William J. Nagel. 1904. pp. xxvi, 1149. 8vo.

Some years ago, recognizing the growing need of a practical text-book upon these topics, Professor Beale began the present volume. Unfortunately its publication has been delayed until now. In the meantime, however, the great